

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

TriState Generation and Transmission Association, Inc.)	Docket Nos. ER19-2440-000
)	ER19-2441-000
)	ER19-2442-000
)	ER19-2443-000
)	ER19-2444-000
)	ER19-2470-000
)	ER19-2474-000

COMMENTS OF LAPLATA ELECTRIC ASSOCIATION, INC.

On August 13, 2019, LaPlata Electric Association, Inc. (“LPEA”), filed a *Motion to Intervene and Request for Extension of Time to File Comments* in the above captioned proceedings. On that same day, the Commission (or “FERC”) issued a *Notice Granting Extension of Time* wherein it explained that the deadline for filing interventions and protests in these proceedings is extended to and including August 23, 2019.

LPEA appreciates the extra time granted by the Commission to file comments.

STATEMENT OF INTEREST

LPEA was incorporated in 1939 as the LaPlata Electric Association. Today, LPEA is the fifth largest electric cooperative in Colorado, serving more than 33,000 members in LaPlata and Archuleta, with segments of Hinsdale, Mineral and San Juan Counties. LPEA operates and maintains 3,521 miles of distribution line and 204 miles of transmission line and sold 988 million kilowatt hours (“Kwhs”) of power in 2018. The average monthly residential use was 649 Kwhs and the average monthly residential bill was \$103.14.

LPEA’s Board of Directors and staff maintain its mission to provide members with safe, reliable electricity at the lowest reasonable cost, while being environmentally responsible. LPEA

has been purchasing power and services from TriState Generation and Transmission Association, Inc. (“TriState”), for over 25 years.

As LPEA stated in its *Motion to Intervene and Request for Extension of Time to File Comments*, TriState’s action in the above referenced proceedings present complicated issues emanating from the interplay between state and federal utility law that LPEA and other parties to these proceedings must understand and be able to adequately explain to their customers (in LPEA’s system, its customers are its Members), to whom LPEA is directly accountable.

At the core of LPEA’s many concerns is how its future ability to ensure affordable rates to Members will be impacted by the change in jurisdictional status of TriState. LPEA has, for over 80 years, done business under the laws of the state of Colorado and has been exempt from FERC’s jurisdiction under section 201(f) of the *Federal Power Act* (16 U.S.C. § 824(f) (2012)).

SUMMARY OF CONCERNS

1. **The primacy of local control over public power utility operations.** Commission policy must not undercut the ability of state and local authorities to regulate existing and future rates and terms of service to LPEA’s customers. Direct accountability to LPEA customers engenders trust and confidence in the management of utility operations and in the decisions on allocations of the cost of service.
2. **Unresolved state jurisdictional issues.** The Colorado Public Utilities Commission (“CoPUC”) has initiated a rulemaking proceeding that proposes to require wholesale electric cooperatives to apply for and receive CoPUC approval of their integrated or electric resource plans. Colorado’s interest in protecting the integrity of utility integrated or electric resource plans is a compelling state interest that deserves respect and

deference. That proceeding should, at the very least, be allowed to proceed to final rule, and if necessary, judicial review.

3. **There is no factual basis in the record of the instant proceedings for finding federal jurisdiction over TriState.** The Commission has no information to enable it to determine whether TriState is able to meet federal jurisdictional requirements.
4. **Insufficient information to fairly and reasonably assess the consequences of TriState's action.** TriState has not provided adequate information to LPEA so that it can reasonably assess the potential consequences of TriState's FERC tariff filing that seeks to subject TriState to federal jurisdiction. Without more information on TriState's future plans, LPEA cannot reasonably determine whether it can protect the legitimate interests of its Members.
5. **LPEA questions whether the Wholesale Electric Service Contracts ("WESCs") and Board of Director Policies filed by TriState in the instant proceedings are consistent with the *Federal Power Act* and the *Public Utility Regulatory Policies Act*.** Contracts were not negotiated to specifically comply with the requirements of the aforementioned federal statutes and therefore, some provisions of those contracts may not be consistent with the Commission's implementing rules and regulations of those statutes.

The following comments amplify these concerns.

COMMENTS

TriState chose to prepare and file the tariff documents in the instant proceedings without any effort to inform or explain to LPEA the actual or potential impacts of that action on LPEA and its Members. The issue of how federal preemption may impact LPEA, its Members, and

other public power entities in the state of Colorado is a trenchant question and as such, the Commission should ensure that this matter receives the strict scrutiny it deserves.

Background

The history of the emergence of public power in the United States and its continued vitality at present is a testament to the efforts of a few towering public figures and the success of local accountability. Early in the 20th Century, when most urban Americans benefited from electric service, rural America had little access to that service. Because of the vast spaces of land and rugged terrain rural electrification was too expensive, in some areas costing \$5,000 per mile. Private power companies would not risk that expense to build generators and power lines that could service those rural areas.

For decades in that Century, life in rural America reflected a 19th Century quality of life, often filled with backbreaking chores and limited access to washing machines, refrigerators, vacuum cleaners and other 20th Century products that were in plentiful supply in urban America. See Munson, R., *The Power Makers* at 72 (1985). As late as 1935, over 85 percent of farms in America lacked electricity. *Id.*, at 82.

That began to change when President Franklin Roosevelt (“FDR”) signed an Executive Order establishing a Rural Electrification Administration to provide low interest loans to public co-ops that would build their own power lines and generators. A U.S. Senator from the rural state of Nebraska, George Norris, who understood firsthand the “drudgery of rural life,” spearheaded public power’s quest for electricity in Congress, *id.* at 73, and is credited with ushering in a corporation “clothed with the power of Government but possessed with the flexibility and initiative of a private enterprise. . .,” the Tennessee Valley Authority, “a

cornerstone of FDR's New Deal and the wildest experiment ever conducted by a Government.”
Id., at 81.

These seminal events of the early 20th Century gave birth to a public power movement that has grown into a stabilizing economic force throughout large swaths of the American landscape. In particular, entities in the public power sector known as rural electric cooperatives, more than 900 of them, are responsible for keeping the lights on for more than 42 million people across some of the most rugged and rural areas of 47 states.

Electric cooperatives (“co-ops”) are driven by their purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and for 75 years electric co-ops have been proud to keep the lights on. The success of these electric co-ops, in no small measure, can be attributed to direct accountability of its management to member/customers. This local community control is a cornerstone of electric co-ops.

Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric co-ops are vital to the economic health of the communities they serve. America's co-ops bring power to 75 percent of the nation's landscape and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. Member cooperatives include 65 generation and transmission (“G&T”) co-ops and 840 distribution cooperatives.

The G&Ts generate and transmit power to nearly 80 percent of the distribution co-ops, those co-ops that provide power directly to the end-of-the-line consumer-owners. Remaining distribution co-ops receive power directly from other generation sources within the electric utility sector. Members generate approximately 50 percent of the electric energy they sell and

purchase the remaining 50 percent from non-members. Both distribution and G&T co-ops share an obligation to serve their members by providing safe, reliable, and affordable electric service. All of this has been accomplished under the auspices of local community and state government control. TriState's attempt to move out of this local regulatory framework, chills many of its Members and causes LPEA to question TriState's underlying motives and future plans.

As a result of TriState's decision not to confer, or offer any explanation to its members or the Colorado Public Utility Commission of its intent to become a FERC-jurisdictional public utility, LPEA finds itself grappling with the potential preemption implications that are not even addressed in TriState's filings in the instant proceedings. The following discussion provides the rationale for LPEA's concerns and the need for the Commission to defer action on this matter.

Discussion

A. State and Local Control - Direct Accountability to Customers.

The state of Colorado has established a regulatory framework that allows LPEA and other public power entities to maintain direct accountability to its members/customers.

1. Public Power in Colorado.

Colorado adopted a comprehensive Public Utilities Law in 1913, which created the CoPUC. At that time, the adoption of the Public Utilities Law created a significant jurisdictional issue: what authority does the CoPUC have over municipal utilities, which were defined by Colorado law as "public utilities" and had existed since 1910 in cities such as Aspen (then Ute City), Fort Morgan, Gunnison, Haxtun, Holyoke, Julesburg, and Wray. Each of those cities was offering municipal electric service.

The issue was resolved by 1926 when the second of two Colorado Supreme Court cases addressed the issue of when it was appropriate for the CoPUC to assert jurisdiction over a

municipality's rate determination. The CoPUC would have jurisdiction over the rates of municipalities when a municipality provides service to customers beyond the limits of that municipality. See *City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926)).

However, the language contained in the holding of the first Colorado Supreme Court case is most striking and stands as a statement of LPEA's belief in the power of local accountability as the foundation of its organizational and operational success.

In *Town of Holyoke v. Smith*, 226 P. 158 (Colo. 1924), the Holyoke town council had established a rate schedule for electric service. Subsequently, the CoPUC asserted jurisdiction and established a higher rate schedule. On appeal, the Colorado Supreme Court found in favor of Holyoke relying upon Article V, Section 35 of the *Colorado Constitution*, which prohibits the general assembly from establishing any special commission with regulatory control over municipal improvements or facilities. The court judicially recognized the primacy of local control over public power utility operations. The court stated, in pertinent part:

A plant owned and operated by consumers can never become a monopoly, nor can it be an instrument of oppression. Hence there is no room for the exercise of the police power. The fixing of rates by the consumers through their agents, the Town trustees, cannot be an evil from which they need protection. On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body.

Town of Holyoke, 226 P. at 296.

Although the electric industry has evolved from localized and isolated utility systems to a more integrated network interconnecting numerous distribution systems and generation resources, LPEA believes the principle articulated by the court in *Holyoke* remains fundamental today. LPEA is concerned that the direct accountability that exists today among LPEA, TriState,

and the CoPUC will be compromised if TriState becomes subject to Commission jurisdiction, by taking away local control and replacing it with a federal entity that is located over a thousand miles away.

2. Unresolved State Jurisdictional Issues.

The CoPUC asserts in its *Motion to Intervene and Protest* (August 13, 2019) that there are “unresolved questions of Colorado law” with respect to TriState’s attempt to seek federal jurisdiction as a public utility under the *Federal Power Act*. CoPUC states in its pleading that it is actively addressing those unresolved issues through a notice of proposed rules that is applicable only to TriState. *See Notice of Intervention and Protest of the Colorado Public Utilities Commission*, at 2; *see also id.*, at 2, n. 5.

Colorado has a clear and compelling interest in sound integrated or electric resource plans for wholesale electric co-ops operating within the state’s boundaries. LPEA believes that the CoPUC should have the legal right to promulgate such rules in the interest of all of Colorado’s ratepaying citizens. Inasmuch as this matter involves a question of state law, it should be left to the appropriate state regulatory agency and state courts to decide.

B. There Is Insufficient Evidence in TriState’s FERC Filing to Prove It Will Meet Federal Jurisdictional Requirements.

1. The New Member of TriState’s System.

Several Motions to Intervene, Protests, and Comments filed in these proceedings state that TriState has failed to provide sufficient disclosure of a potential new member on its system that will qualify TriState to be subject to Commission jurisdiction. LPEA joins that chorus of voices requesting that TriState disclose who that potential new member is and explain exactly what type of membership interest they will hold. LPEA also urges the Commission to require

TriState to describe whether the new member(s) will own, operate, or control any jurisdictional facilities or assets, or control any inputs to generation.

Without such information, LPEA believes the Commission does not have a factual basis upon which to determine whether it has jurisdiction over TriState. Simply stated, LPEA believes that TriState's filings in the above captioned proceedings are patently deficient and, as such, must be dismissed by the Commission.

LPEA is concerned that the primary purpose of TriState's plan to add a new member/owner, that will not be an electric co-op or a governmental entity and will not directly or indirectly be wholly-owned by an electric co-op or governmental entity, is to eliminate the CoPUC's existing authority to protect TriState's Member co-ops in Colorado and their retail service customers' interest.

If the Commission chooses not to dismiss TriState's filings, then LPEA urges the Commission to require TriState to respond to questions concerning TriState's future service plans in order to ensure that the consumer interests of TriState's Member co-ops in Colorado and other states are fully protected.

If TriState's primary motive is to avoid scrutiny by appropriate state agencies, the Commission should not reward TriState for such tactics. The Commission must ensure that this forum shopping does not come at the cost of valid state interests in protecting customers within state boundaries.

2. TriState's FERC filings provide insufficient information for LPEA to fairly and reasonably assess the consequences of TriState's proposed action.

TriState has failed to give LPEA enough information for it to fully understand or reasonably assess how LPEA's future rate assessments and determinations will be impacted and, therefore, undercuts LPEA's ability to provide comments that adequately address the

consequences of TriState's potential jurisdictional status change. *See PP&L Inc.*, 95 FERC 61,160 at 61,520 (2001) ("we ... reject a rate application where ... the application is patently deficient"). LPEA has attempted to communicate with TriState on these matters and has not received sufficient responses that would allow LPEA to understand fully the impact of TriState's potential new jurisdictional status.

LPEA urges the Commission to require TriState to provide a full description of its potential new Member(s), along with a comprehensive explanation of how its new status will affect its Member/customers' future rate assessments. *See id.* (explaining that a deficiency letter may be appropriate "to cure specific omissions from a rate application that otherwise substantially complies with our filing requirements").

C. TriState's Filed Jurisdictional Agreements Must Meet Federal Statutory Standards and Regulations.

TriState's jurisdictional agreements (including WESCs and Board Policies) were not negotiated under Commission jurisdiction and, therefore, may not comply with Commission policies and regulatory requirements. Before TriState is allowed to transition to Commission jurisdiction, TriState must conform to Commission rules and regulations.

LPEA urges the Commission to specifically investigate TriState's policy on capping its members' output of distributed generation ("DG") at five percent of the members' gross energy requirements in any calendar year. This policy limits the *quantity* of energy that member co-ops can generate from DG.

LPEA agrees with the CoPUC that this limitation is inconsistent with principles of sound market design and also believes that such policy is inconsistent with Commission policy that encourages the entry of new supply resources into Commission regulated markets. *See Notice of Intervention and Protest of the Colorado Public Utilities Commission* at 14 (August 13, 2019);

Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071 at 247 (Oct. 17, 2008).

LPEA also submits that TriState's policy is inconsistent with Colorado's laws that require electric co-ops that are Qualifying Retail Utilities to procure a certain percentage of their requirements from renewable energy resources, with explicit mandates for retail DG (Colorado Revised Statutes 40-2-124). Without the 95 percent requirement, LPEA would acquire additional renewable resources in order to conform to Colorado requirements.

In addition, LPEA urges the Commission to investigate TriState's policy of including energy storage resources (ESRs) in the definition of DG even though ESRs simply store energy produced by other generators. TriState's policy appears to be inconsistent with the Commission's policies in favor of encouraging ESR development and ensuring just and reasonable practices. *See Electric Storage Participation in Markets Operated By Regional Transmission Organizations and Independent System Operators*, Order No. 841, Docket Nos. RM16-23-001 and AD16-20-001, 162 FERC ¶ 61,127 (Feb. 15, 2018), *rehearing denied*, Order No. 841-A, 167 FERC ¶ 61,154 (May 16, 2019); *Midcontinent Independent System Operator, Inc.*, Deficiency Letter, Docket No. ER19-465 (April 1, 2019) (requiring RTO to explain how it would prevent duplicative charges for ESRs located on distribution system with respect to compliance with Order No. 841).

CONCLUSION

TriState's actions in the instant proceedings present complicated issues that include federal preemption, and deserve comprehensive analysis by the Commission. LPEA seeks to ensure that the rights and privileges it and its Members currently enjoy under Colorado laws are

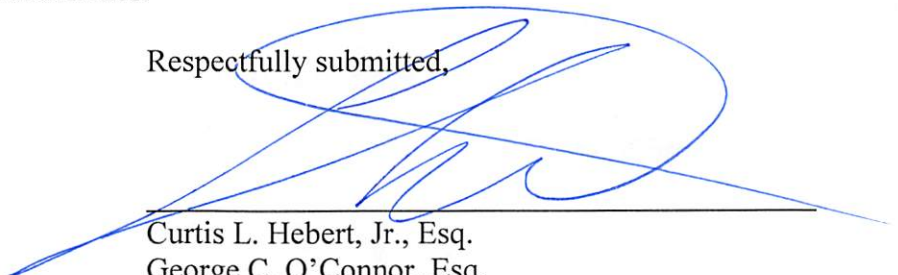
not unduly disturbed or unreasonably affected by the change in jurisdiction that TriState is seeking in these proceedings.

Given the gravity of the requested jurisdictional changes, it is not unreasonable for the Commission to suspend existing regulatory timelines for action and ensure that the matters raised in these, and other comments filed in these proceedings, including protests, are thoroughly considered.

Recommendations

1. That the Commission either rejects TriState's filings in the instant proceedings as a result of patent deficiencies in establishing the factual basis for federal jurisdiction or issues a deficiency letter requesting those infirmities be cured.
2. That the Commission suspends the instant proceedings until such time that the CoPUC resolves the currently-pending state law issues.
3. That the Commission thoroughly investigates TriState's filed WESCs and Board Policies to ensure compliance with the applicable federal statutes and Commission rules and regulations.
4. That in the event the Commission decides to grant TriState jurisdiction under the *Federal Power Act*, it ensures that its efforts to oversee such entity appropriately honors the boundaries of its own jurisdiction and does not encroach upon matters that Congress has reserved to state and local authorities.

Respectfully submitted,

A large, stylized handwritten signature in blue ink, likely belonging to Curtis L. Hebert, Jr., Esq., is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Comments of LaPlata Electric Association, Inc., on all persons on the Commission's service list in Docket Nos. ER19-2440-000, ER19-2441-000, ER19-2442-000, ER19-2443-000, ER19-2444-000, ER19-2470-000, and ER19-2474-000, and all persons designated for service in transmittal letter of TriState Generation and Transmission Association, Inc.

Dated this 23rd day of August, 2019.

/s/ Curtis L. Hebert, Jr.
Curtis L. Hebert, Jr., Esq.